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No. 532

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In the Supreme Court of the United States

October Term, 1961

O. D. [illegible], Director, Bureau of Reclamation, United States Department of the Interior, et al.,

Petitioners,

v.

The Pacific Lumber Co. and Pacific Lumber Co.,

Respondents.

P. J. [illegible], Director, Bureau of Reclamation, United States Department of the Interior, et al.,

Petitioners,

v.

Arcata Redwood, Inc.,

Respondent.

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Deputy Commissioner C. D. Calbeck and Deputy Commissioner P. J. Donovan, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in these cases on July 13, 1961.

OPINIONS BELOW

The opinion of the district court in the *Travelers Insurance* case has not yet been reported. The district court rendered no opinion in the *Avondale* case. The opinions of the court of appeals in the cases (App. A and B, *infra*, pp. 21–39) are reported at 293 F. 2d 52 and 51, respectively.

JURISDICTION

The judgments of the court of appeals were entered on July 13, 1961 (App. C, *infra*, pp. 40–41). By order dated October 5, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injuries sustained by an employee while working on a vessel under construction that was afloat upon navigable waters are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act because recovery for such injuries may be had under a State workmen's compensation law.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part:

§ 902. DEFINITIONS.

When used in this chapter—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, * * *.

* * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

§ 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

§ 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907–909 of this title. * * *

* * * * *

§ 920. PRESUMPTIONS.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

STATEMENT

These cases involve the application of the Longshoremen's and Harbor Workers' Compensation Act ("the Longshoremen's Act") to injuries sustained by employees while working on vessels under construction that are afloat on navigable waters. The basic facts in each case were found by the Deputy Commissioner and are not in dispute.

1. (a) *The Travelers Insurance case.* The employer owns and operates a shipyard on the Sabine River, between Orange, Texas, and Calcasieu Parish, Louisiana, at which it constructs new vessels and repairs completed vessels. Its employees work on both kinds of vessels, and it is usual for an employee to work on a repair project one day, and upon new construction the next (R. 24, 39–42).[1] The employer had numerous employees engaged in traditional maritime employment upon navigable waters (R. 15, 40–41).

Roger McGuyer was a welder employed by the employer at an average wage of $81 a week. On July 8, 1957, he was working upon an oil drilling barge which was in process of construction. The barge was afloat on the navigable waters of the Sabine River in Louisiana (R. 14–15). The barge had been launched, and the superstructure was being built. While McGuyer was welding on the port side of the deck, a tank exploded about 40 feet away, throwing a bucket through the air which struck him and caused severe head injuries. On July 16, 1957, he died from a

[1] References are to the printed record in the court of appeals in each case.

cerebral concussion which resulted from those injuries. He was survived by his wife and two children (R. 14–16).

(b) *The Avondale Shipyards case.* The employer, which is qualified as a self insurer under the Act, operates two shipyards near New Orleans, Louisiana, where it builds and repairs vessels. At its Avondale yard, the greater part of the work consists of fabrication of machinery and structural steel and the construction of new vessels, but repair work on completed vessels, which is the principal work at its second yard, is also performed there. The employer has numerous employees at both plants who are engaged in traditional maritime employment (repair work) upon navigable waters (R. 48–49).

Minus Aizen was a 25 year old tack welder employed at the Avondale yard at an average weekly wage of $89.32 (R. 38, 49, 51). On August 11, 1956, he was engaged in work upon a drilling barge intended for use in offshore oil operations. The barge had been launched and was floating on the Mississippi River but had not been completed (R. 49–50). When he was placing an eye-lug welded to pipe in proper place with a "come-along", the latter broke and caused a piece of steel to hit him on the head, knocking him off the scaffold onto the barge below and then into the river (R. 33, 38, 50). He suffered a fractured skull, brain damage, a fractured right forearm, broken left wrist, arm, and hip, and body contusions (R. 33, 39). As a result of these injuries, which arose out of and in the course of his employment, Aizen suffered total and permanent disability (R. 50–51).

2. The Texas Workmen's Compensation Law could probably have been applied to Roger McGuyer's death, even though the injury occurred within Louisiana.[2] It provides that the maximum compensation for death is $35 a week for a period of 360 weeks, or a gross amount of $12,600. V.R.C.S., Art. 8306, § 8. The Longshoremen's Act, however, provides maximum benefits for an employee's death of $54 a week during widowhood and dependency. Under that Act, Mrs. McGuyer and her children would receive $52.65 a week as long as the children were under 18, and Mrs. McGuyer would receive $28.35 thereafter during widowhood. 33 U.S.C. 909. Based upon standard mortality tables, the gross amount due for McGuyer's death under the Longshoremen's Act would be approximately $77,500[3]—six times more than the sum recoverable under the Texas Workmen's Compensation Law.

The maximum payment for total disability for Minus Aizen under the Louisiana Workmen's Compensation Act would be $35 a week, for a period of 400 weeks, or a gross amount of $14,000. La. R.S. 23: 1202 and 1221. Under the Longshoremen's Act, however, he was entitled to $54 a week for life. 33 U.S.C. 906(b) and 908(a). Based on a life expectancy of 40 years, he could expect to receive a gross amount of $112,320 under federal coverage, plus medical expenses—at least eight times the payments under the Louisiana law.

Mrs. McGuyer and Aizen both elected to seek compensation under the Longshoremen's Act by filing

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[2] See *Kelley* v. *Summers*, 210 F. 2d 665, 673 (C.A. 10).

[3] Brief for Appellees McGuyer, in the court of appeals, p. 6.

claims for benefits thereunder. In each case the employer had actual knowledge of the injury and the employer (or insurance carrier) had attempted (prior to the filing of the claim) to pay compensation due under the applicable state law.[4] In each case, after a full hearing, the Deputy Commissioner found the facts set forth above and made an award of compensation under the Longshoremen's Act.[5] In each case the employer sought judicial review, and in each case the district court upheld the award.

The Court of Appeals for the Fifth Circuit reversed in both cases. In the principal opinion (in

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[4] In the *Travelers Insurance* case the insurance carrier actually paid McGuyer's widow and children $153.57, purportedly under the Texas Workmen's Compensation Act (R. 16). In the *Avondale* case, the employer paid Aizen $35 a week for 180 weeks with checks which indicated that they represented payment under the Louisiana Workmen's Compensation Act, plus medical expenses, and also paid him approximately $3800 by checks marked "advance on compensation" (R. 17, 51).

[5] In the *Travelers Insurance* case, Deputy Commissioner Calbeck originally denied the claim of Mrs. McGuyer and her children for death benefits on the ground that work on uncompleted vessels is not within the coverage of the Act. When the claimants brought suit to review the denial of the claim in the *Travelers* case, Deputy Commissioner Calbeck, after various procedural motions, filed an answer on January 11, 1960, admitting the allegations and asking that the case be remanded. In the meantime, Deputy Commissioner Donovan had made an award to the claimant in *Avondale* on January 27, 1960 (R. 51–53). On April 20, 1960, the district court remanded the *Travelers* case, and Deputy Commissioner Calbeck thereafter entered an award under the Longshoremen's Act in favor of Mrs. McGuyer and her children. (Civil Action No. 7507, W.D. La.).

the *Travelers Insurance* case), it held (per Judge Brown) that although longshoremen working on a ship and repairmen working on a completed vessel are covered by the Longshoremen's Act, "persons working on an uncompleted vessel afloat but under construction" are covered only by state workmen's compensation laws (App. A, *infra*, p. 36). The court noted (*id.*, pp. 24–25) that Section 903(a) of the Longshoremen's Act (*supra*, p. 3) provides that compensation thereunder "shall be payable * * * only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." It stated, (*id.*, p. 25) that, five years before the enactment of the Longshoremen's Act in 1927, this Court, in *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469, held that a State "could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters"; and that "the line which the Court drew in the pre-1927 days" between "uncompleted construction versus repair of a completed vessel" "was the line which Congress adopted in § 903(a) * * *" (App. A, pp. 25–26; see *id.*, p. 30). In that section Congress "adopted" the "categorical pre-1927 holding * * * that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be 'validly * * * provided by state law'" (*id.*, p. 34).

REASONS FOR GRANTING THE WRIT

The court of appeals in these cases has announced the rule that employees injured while working on vessels under construction which are afloat on navigable waters are not covered by the Longshoremen's Act. This ruling is contrary to the standards which this Court has applied in determining the coverage of the Longshoremen's Act; it conflicts in principle with the decisions of three other circuits; and it presents an important question in the administration of the Longshoremen's Act which affects many thousands of shipyard workers.

1. A literal reading of the Act would appear to support the decision below. Section 3(a) (33 U.S.C. 903(a) (*supra*, p. 3) provides that compensation shall be payable under the Act only (1) if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock), and (2) "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." In 1922 this Court held that the Oregon workmen's compensation statute, which provided the exclusive remedy for injuries suffered within the State, could be constitutionally applied to injuries sustained by a workman on a vessel in process of construction which was on navigable waters within the State. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469. Thus, if the *Rhode* case stands for the broad proposition that a State compensation law may apply to injuries sustained while working on new construction on navigable waters (as

the court below held), and if recovery under the Longshoremen's Act is barred whenever a State workmen's compensation law may validly cover the injury, the court below correctly held that the Act does not apply to the injuries suffered in these cases while the employees were performing construction work upon new vessels afloat upon navigable waters.

In a series of cases, however, this Court has implicitly rejected this literal reading of the Act, and has indicated its applicability to injuries occurring upon navigable waters even though they may also be compensable under State compensation laws. In *Davis v. Department of Labor*, 317 U.S. 249, 256, the Court, in holding that a State could apply its compensation law to the death of a construction company employee who was killed while working on a barge on a navigable river, recognized that there is a "twilight zone" in which recovery for injuries occurring upon navigable waters may, at the election of the injured employee, be had under either federal or State law. The Court stated (pp. 255–256) that since "the line separating the scope" of federal and State jurisdiction was "undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side"; and that

> * * * we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves

> easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. * * *

Mr. Justice Frankfurter, in a concurring opinion, stated (p. 259) that "the practical result" of the Court's practice was that "the employee in a situation like the present is permitted to recover either under the federal act * * * or under a state statute * * *." Mr. Chief Justice Stone, dissenting, similarly recognized that the Court had enunciated the doctrine "that recovery under either the state or the federal act is to be sustained if the case is thought a close one" (p. 261), and he criticized the "proposition that an employee in a 'twilight zone' (where it is doubtful whether the federal or a state act applies) can recover under either act * * *" (p. 262).

Following the *Davis* case, this Court twice held, *per curiam*, that State compensation laws cover injuries incurred by employees while repairing existing vessels on navigable waters, even though prior to the Longshoremen's Act it had held that recovery for such injuries could be had only under federal maritime law, and not under State compensation

laws.[6] *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478; *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854, vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549, and remanding for reconsideration in the light of the *Moores* case, *supra*.[7]

In *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366, the Court upheld the applicability of the Longshoremen's Act to an injury that occurred on land. An employee was killed while working approximately 400 feet from the water, on a barge that had been drawn out of the water on a marine railway. The employer argued that since the injury occurred on land, the State compensation law could validly apply and that the federal Act was therefore inapplicable. Brief for petitioner, No. 44, October Term, 1953, pp. 7–25. This Court, however, affirmed *per curiam*, the award under the federal statute, citing the *Davis*, *Moores* and *Baskin* cases, *supra*.[8]

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[6] *Baizley Iron Works* v. *Spun*, 281 U.S. 222; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479.

[7] Following the remand, the California court ordered the State Industrial Accident Commission to take jurisdiction of the claim under the State compensation law (97 Cal. App. 2d 257, 217 P. 2d 733), and this Court affirmed that order. *Kaiser Company* v. *Baskin*, 340 U.S. 886.

[8] In *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, a freight brakeman was injured while releasing a brake on a railroad freight car that was located on a car float on navigable waters. The question was whether the Longshoremen's Act or the Federal Employers' Liability Act applied. In holding that the injuries were compensable exclusively under the Longshoremen's Act, this Court first stated (p. 337) that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water. Therefore respondent

The present cases, in which the injuries occurred upon navigable waters, are obviously stronger cases for the applicability of the federal statute than the *Avondale Marine Ways* case where, although the employee was injured while working on a barge, the actual accident occurred on land. In both *Avondale Marine Ways* and the present cases, State law might validly provide compensation for the injuries. The decision in *Avondale Marine Ways* upholding the applicability of the federal Act necessarily means that coverage under that Act is not foreclosed merely because the employee could also be covered by State law.

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comes within the coverage of that portion of § 903(a) that includes those outside the reach of state compensation laws." The Court then ruled (p. 339) that the fact that the employee's duties were commonly regarded as "railroading" rather than those of longshoremen "misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." The Court stated (p. 340) that the exclusive coverage of the Longshoremen's Act "extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act."

The Court thus held that, regardless of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters. The Court's reference to "that portion of § 903 (a) that includes those outside the reach of state compensation laws" does not indicate that, if the injury is within the reach of such laws, the Longshoremen's Act cannot apply. Moreover, to whatever extent it may so indicate, this statement appears contrary to the *Avondale Marine Ways* case, *supra*, decided the next Term after *O'Rourke*.

The court of appeals in the present cases attempted to distinguish *Avondale Marine Ways* on the ground that here there was "the categorical pre-1927 holding" in *Grant Smith-Porter Ship Co.*, v. *Rohde*, 257 U.S. 469, that a State may validly provide compensation for injuries sustained while working on uncompleted construction upon navigable waters (App. A., *infra*, pp. 33–34). There was, however, an equally "categorical pre-1927 holding" that a State may provide compensation for injuries sustained while performing maritime work upon land—the precise situation which this Court held in *Avondale Marine Ways* was covered by the federal Act. *Industrial Commission* v. *Nordenholt*, 259 U.S. 263.

In short, the teaching of the line of cases starting with *Davis* is that, in the "twilight zone" in which injuries occurring upon navigable waters may also be compensable under State law, the employee has an election to seek redress under either federal or State law. See *Haha* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273. The court below, by denying the employees the right to federal coverage in the present "twilight zone" cases, has thus failed to follow the controlling decisions of this Court. Here, the employees elected to proceed under the federal law, and, as this Court stated in *Davis* (317 U.S. at 256–257), the conclusion of the deputy commissioner "that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error." See *Parker* v. *Motor Boat*

Sales Co., 314 U.S. 244,[2] and the *Avondale Marine Ways* case, *supra*.

2. The decisions below, which hold that the Longshoremen's Act is not applicable to injuries occurring upon navigable waters for which State compensation laws may validly provide recovery, conflict in principle with the decisions of three circuits which have upheld the coverage of the federal Act for accidents subject to State compensation laws. The Fourth Circuit has sustained the applicability of the federal Act to injuries suffered by workers while engaged in the construction of a dry dock. *Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949; see, also, *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968. The Ninth Circuit has held the federal Act applicable to injuries sustained while working upon navigable waters by employees constructing a dam on a river. *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542, certiorari denied, October 9, 1961 (No. 99, this Term). Under the rationale of the court of appeals in the present cases, however, none of these injuries would be covered by the Longshoremen's Act.

In *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2d 304, the Sixth Circuit held that the Longshoremen's Act applied to the death of a clean-up man in a sand and gravel yard located on the bank of a

[2] In *Parker* v. *Motor Boat Sales*, 314 U.S. 244, this Court sustained an award of compensation under the Longshoremen's Act for injuries sustained by a janitor or porter suffered on navigable waters while testing an outboard motor for his employer, a local boat dealer.

navigable river, which occurred when he fell off a barge while inspecting it. The court ruled (p. 307) that since the death occurred upon navigable waters, "his widow was entitled to compensation under the Act if his death arose out of and in the course of his employment, whether or not he was engaged in 'maritime employment.'" See also *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, *supra*, pp. 12–13, footnote 8. The ruling in *Dixie Sand* that the Longshoremen's Act applies in such circumstances is inconsistent with the view of the court of appeals in the present cases that, even though those circumstances are present, the Act does not apply if compensation may be available under State law.

3. For these reasons, we believe that the decisions of this Court and of other courts of appeals fully sustain the rulings by two deputy commissioners, upheld by two different district courts. But in any event, the question whether injuries sustained by employees while working on new construction afloat on navigable waters are covered by the federal Act is one that this Court should decide. Other than the decisions below, we have found no cases since *Davis* which have disallowed an election by employees injured while working on navigable waters to seek compensation under the Longshoremen's Act.[10] Simi-

[10] Prior to *Davis*, the Fourth Circuit had held that the Longshoremen's Act does not cover injuries sustained by an employee working on new construction afloat on navigable waters. *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639. As the court of appeals noted in these cases, however, the *Taylor* case is "no longer followed" by the

larly, commentators have agreed that federal coverage is not to be denied merely because the injury might also be compensable under State law.[11] The decisions of the court of appeals in these cases will inevitably create doubt and uncertainty in an important area of federal law that has hitherto been considered settled.

The decisions below would lead to anomalous results. For example, a shipyard employee would not be covered by the federal statute if he were working on a new ship, but would be covered if he momentarily happened to move over to work on an existing ship which was next to the new one.[12] There is nothing in the language or the legislative history of the Longshoremen's Act which indicates that Congress intended to produce such inconsistencies,[13] or that it intended

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Fourth Circuit (App. A, *infra*, p. 33, n. 20). See the *McManigal* and *O'Hearn* cases, *supra*, p. 15.

[11] Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 Harv. L. Rev. 637, 644; Comment, *Overlapping Remedies for Injured Harborworkers: Interaction on the Waterfront*, 67 Yale L. J. 1205.

[12] Roger McGuyer, the deceased employee in the *Travelers Ins. Co.* case, was a welder. It was the practice in his shipyard for welders to do repair work on completed vessels on one day and work on new vessels on the next (R. 41–42).

[13] On the contrary, the legislative history is fully consistent with the view that Congress merely intended to apply the traditional line of demarcation between state and federal maritime jurisdiction, namely, that injuries upon navigable waters (including dry docks) would be compensable under the federal Act, and injuries on land would be compensable under State compensation legislation. See S. Rep. No. 973, 69th Cong., 1st Sess., p. 16; H. Rep. No. 1767, 69th Cong., 2d Sess., p. 19. Indeed a report accompanying the most recent Congressional amendment to the Act indicates that this was the intent of Congress. H. Rep. No. 2287, 85th Cong., 2d Sess., p. 2.

federal coverage to depend on whether, prior to the Act, this Court had considered the applicability of State compensation laws to the particular maritime employment involved. As this Court has pointed out, the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results" (*Voris* v. *Eikel*, 346 U.S. 328, 333).

The question of the compensation coverage of workers engaged in the construction of new vessels upon navigable waters is important and recurring. There are approximately 120,900 employees of private shipyards in the United States, of which 18,400 are in the Gulf Region (which includes Florida, Alabama, Mississippi, Louisiana, and Texas, but not Georgia). See p. 17 of the July, 1961 issue, *Employment and Earnings*, Bureau of Labor Statistics, Department of Labor. Because most of the shipyards perform both construction and repair work, no statistics are available on the number of employees engaged in construction of new vessels, and that number probably varies from day to day. However, the number engaged in construction work undoubtedly constitutes a large proportion of the 120,900 employees, and a substantial number of those who are engaged in construction of new vessels work upon navigable waters. Disparities between the amount of compensation provided under the Longshoremen's Act and the smaller amounts provided under State law, similar to those here involved (see *supra*, pp. 6–7), are common, particularly in cases where the injury results in death or total disability of the

employee.[14] Thus the question presented here vitally affects important rights of many thousands of employees.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
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NOVEMBER 1960.

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[14] 2 Larson, *Workmen's Compensation*, Appendix B, Table 8, pp. 524–525, and Table 15, pp. 548–549.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY, APPELLANTS

v.

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL., APPELLEES

Appeal from the United States District Court for the Western District of Louisiana.

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, *Circuit Judges.*

BROWN, *Circuit Judge:* We have again the old, old contest: is the claim for injuries to an amphibious worker under the State Compensation Act? Or is it under the Federal Act?[1] Phrasing it differently, the question is all embracing. As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear

[1] Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§ 901-950.

as day or as black as night?[2] Specifically the question presented is whether a person injured while working on an uncompleted vessel then launched and afloat in navigable waters, but still under construction, is covered by the State Act, or the Longshoremen's Act, or perhaps either one or both depending on the injured party's ultimate choice under the "first-come-first-served"[3] Twilight Zone option?

Again as we remarked before, "the facts, strikingly simple, neither complex nor conflicting, are not the cause of bewilderment." *Flowers* v. *Travelers Ins. Co.*, 5 Cir., 1958, 258 F. 2d 220 at 221. The Employer operates a shipyard on the Sabine River. At the shipyard it builds new vessels and also repairs completed ships. Its employees, including welders, perform work both on repairs and on construction. There is constant interchange between the two types of work. The Employee McGuyer on July 15, 1957, was injured while working on an oil drilling barge then under construction. The barge had been launched and the superstructure was being built. While McGuyer was welding on the port side of the deck, a tank exploded causing severe head injuries from which he died three days later. The drilling barge had never been used in navigation, and there was still substantial work to be done before it could be so utilized.

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[2] By rare coincidence the identical question is before us in a separate case from a different district. Argued and submitted on the same day, it has been decided this day. *Avondale Shipyards, Inc.* v. *P. J. Donovan, Deputy Commissioner*, 5 Cir., 1961, ---- F. 2d ----, ---- AMC ---- [No. 18,695].

[3] *Davis* v. *Department of Labor of Washington*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, was so characterized in *De Bardeleben Coal Corp.* v. *Henderson*, 5 Cir., 1944, 142 F. 2d 481 at 483.

In proceedings before the Deputy Commissioner[4] the original Compensation Order made on February 18, 1959, rejected the claim for death benefits filed by the widow and children. The Deputy Commissioner went right to the heart of the matter. As the reason for rejecting the claim, he formally stated that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

But while that was thought to be the final order it was not. Indeed, a year and a half later the final Award now under review was a complete reversal and held that the Longshoremen's Act did apply. In review proceedings that Order was twice remanded to the Deputy Commissioner.[5] Except that there was an elaboration on essentially inconsequential details, the last Award of May 13, 1960, with no explanation for the change of decision, now declared the injury subject to the Longshoremen's Act and made an Award of death benefits. The record, as such, does not spell out this change of heart. On the argument, however, there was general agreement by all counsel that this change in the Deputy Commissioner's de-

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[4] United States Department of Labor, Bureau of Employees' Compensation.

[5] Apparently the Employer took an appeal under 33 USCA § 921(b) from the original Order of February 18, 1959. The Court remanded the case for further proceedings for the Deputy Commissioner "to reconsider the question of the situs of injury to be in Orange, Texas." By a modification award on July 30, 1959, the order was amended to show the situs to be Calcasieu Parish, Louisiana. The Order as thus amended, denying benefits for want of coverage, was again brought before the Court. On April 20, 1960, the Court again remanded it to the Deputy Commissioner "in order to permit him to make findings and conclusions in accordance with the facts and the law."

cision was largely the result of a like change of view by the Bureau of Employees' Compensation concerning the underlying legal question of coverage for new construction. For reasons we later discuss, we regard this change as significant, not because either counsel or court consider this an intrusion into the independent adjudicatory functions of the Deputy Commissioner, but rather as a convincing demonstration that until these two cases[6] there was no serious contention that new construction work was covered.

While this problem has its genesis in the constitutional travail which gave birth to *Jensen*,[7] which despite severe criticism displays a remarkable tenacity so that each year sees fresh evidence of its continued vitality, *Kossick* v. *United Fruit Co.*, 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56, our inquiry is no longer on that level. Now it is simply a question of statutory construction to determine, not how far Congress could have gone, or what Congress had to do, but rather what Congress did.[8] That question of statutory construction centers around § 903(a)[9] which defines the coverage of the Longshoremen's Act in terms

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[6] See note 2, *supra*.

[7] *Southern Pacific Co.* v. *Jensen*, 1917, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[8] To the synopsis in *Flowers*, *supra*, 258 F. 2d 220 at 221, note 2, may be added that developed in some subsequent cases of this Court. *T. Smith & Sons, Inc.* v. *Williams*, 5 Cir., 1960, 275 F. 2d 397 at 398–401; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1311, modified on rehearing, 279 F. 2d 75; *Noah* v. *Liberty Mutual Ins. Co.*, 5 Cir., 1959, 265 F. 2d 547, 1959 AMC 573, overruled on rehearing en banc 5 Cir., 267 F. 2d 218, 1959 AMC 2047; *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F. 2d 42.

[9] The numbers in brackets [1] and [2] are inserted to emphasize the two distinctive separate jurisdictional requirements:

33 USCA § 903(a). "Compensation shall be payable under this chapter in respect of disability or death of an employee,

which are jurisdictional in nature and impact. *Crowell* v. *Benson*, 1932, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Precisely the question relates to prerequisite [2] "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We start with an historic legal fact. In 1922 five years before the enactment of the Longshoremen's Act in response to the constitutionally unsuccessful efforts to adopt state compensation laws for maritime workers, the Supreme Court dealt with this very situation. With *Jensen* then, as now, a matter of everyday preoccupation, the Court held that Oregon could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters. *Grant Smith-Porter Ship Company* v. *Rohde*, 1922, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321. That the line was drawn precisely on uncompleted construction versus repair of a completed vessel is demonstrated overwhelmingly by contemporary cases upholding the supremacy of admiralty and prohibiting the application of state compensation acts to injuries received by those repairing existing vessels.[16] Rejecting the

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but only if [1] the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if [2] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

[16] *John Baizley Iron Works* v. *Spun*, 1930, 281 U.S. 222, 50 S. Ct. 306, 74 L. Ed. 819, 1930 AMC 755; *Robins Drydock & Repair Co.* v. *Dahl*, 1925, 266 U.S. 449, 45 S. Ct. 157, 69 L. Ed. 372, 1925 AMC 182; *Great Lakes Dredge & Drydock Co.* v. *Kierejewski*, 1923, 261 U.S. 479, 43 S. Ct. 418, 67 L. Ed. 756, 1923 AMC 441; *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 1924, 226 U.S. 171, 45 S. Ct. 39, 69 L. Ed. 228, 1924 AMC 1539; *Messel* v. *Foundation Co.*, 1927, 274 U.S. 427, 47 S. Ct. 695, 71 L. Ed. 1135, 1927 AMC 1047.

contention of the injured repairman that "when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of the state Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in *Grant Smith-Porter Ship Co.* v. *Rhode* * * *," the Court went on to pinpoint the very ground of distinction. "In *Grant Smith-Porter & Co.* v. *Rohde, supra,* claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation, and which had not become an instrumentality of commerce." *Baizley Iron Works* v. *Span, supra,* 281 U.S. 222 at 230, 231.

And the line which the Court drew in the pre-1927 days was the line which Congress adopted in § 903(a), note 9, supra. The Court itself has said so in the plainest of terms, often repeated.[11] "The main impetus for the longshoremen's * * * Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the

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[11] *Davis* v. *Department of Labor of Washington*, 1942, 317 U.S. 249 at 256, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, the Court stated: "In our decision in *Parker* v. *Motor Boat Sales* * * * we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction."

Even more recently in *Pennsylvania Ry. Co.* v. *O'Rourke*, 1952, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367, 1953 AMC 237, it first stated, "This Act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation." The Court went on to declare: "A quarter of a century of experience has not caused Congress to change the plan. The 'Jensen line of demarcation between state and federal jurisdiction' has been accepted." 344 U.S. 334 at 337.

aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 1941, 314 U.S. 244 at 250, 62 S. Ct. 221, 86 L. Ed. 184, 1942 AMC 1.

Of course in this analysis we may not ignore the Twilight Zone concept announced by *Davis, supra.* In effect it holds that where it is difficult to ascertain what the line is, or on which side of any such assumed line the facts put a particular case, "an injured waterfront employee" was given "an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Hahn* v. *Ross Island Sand & Gravel Co.*, 1959, 358 U.S. 252 at 273, 79 S. Ct. 266, 3 L. Ed. 2d 292. But neither *Davis* nor *Moore*[12] nor *Baskin*[13] were intended to make everything twilight merely because the injury occurred near the waterfront to one who worked in, on, under or around it. The Twilight Zone concept was "devised to solve cases in, not to create, the twilight." *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d at 228.

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[12] Moore's case, 1948, 323 Mass. 162, 80 N.E. 2d 478, 1958 AMC 1862, affirmed *per curiam, sub nom. Bethlehem Steel Co.* v. *Moore*, 1948, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417.

[13] *Baskin* v. *Industrial Accident Commission*, 1949, 338 U.S. 854, 70 S. Ct. 99, 94 L. Ed. 523, reversing, *per curiam*, 89 Cal. App. 2d 632, 201 Pac. 2d 549; on remand to the state court, 97 Cal. App. 2d 257, 217 Pac. 2d 733, affirmed *per curiam, Kaiser Co., Inc.* v. *Baskin*, 1950, 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

Indeed, *Davis* properly understood is a recognition that there are *some* activities and some areas in which the *Jensen* line is clear and distinct. As to those the command of Congress is emphatic: those on the "admiralty" side are exclusively covered by the Longshoremen's Act; those on the "maritime but local"[14] side are state.

There is here more than the normal compulsion to heed the congressional command simply because it is the law. Here there is an imperative necessity. All—courts, judges, counsel, employers and employees in the industrial maritime field, insurers and marine underwriters—deplore the uncertainty in this problem. Recognized, of course, is the inescapable fact that from the nature of this overlapping of state and federal sovereignty, the problem at times is serious and substantial and, like Mordecai at the Gate, simply will not go away. But in those areas—rare as they might be—in which there is clarity, in which the line is clearly drawn, in which it may be said with some competent assurance that it is either one or the other, effectual enforcement of the socially desirable aim of securing a speedy determinable money indemnity under the operation of automatic self-executing[15] compensation statutes requires that

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[14] The *Jensen* problem does not arise unless there is a conjunction of (1) an injury and (2) its occurrence on navigable waters. Where the injuries occur on land or what is deemed an extension of land, the maritime law has no application at all. *State Industrial Commission* v. *Nordenholt Corp.*, 1922, 259 U.S. 263 at 275–76, 42 S. Ct. 473, 66 L. Ed. 933.

[15] We have several times outlined the self-executing nature of the Longshoremen's Act. *Flowers* v. *Travelers Ins. Co.*, *supra*, 258 F. 2d 220 at 225–27; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 5 Cir., 1960; 274 F. 2d 794 at 799–801; and *T. Smith & Son, Inc.* v. *Williams*, *supra*, 275 F. 2d 397 at 400, note 11.

courts have the resourcefulness to ascertain, and when ascertained, the fortitude to stand by the declaration of an identifiable line.

Such consideraions have cut a large figure in the disposition this Court has made in two well-defined areas. Where from contemporary action by state courts in the maritime states of this Circuit the pre-existing certainty was imperiled by the beguiling appeal of a free-wheeling election or the assertion that what had been clear was now Twilight, this Court, not without some travail of its own, hewed to the line. Longshoremen, loading or unloading vessels on navigable waters were restored once and for all to the place where Jensen put them. *Noah* v. *Liberty Mutual Ins. Co., supra,* note 8. This stand has more than restored symmetry within the federal establishment of this Circuit. It has, without a doubt, been a substantial factor in the decisions of the state courts. If federal courts who are charged primarily with the immediate responsibility of elucidating the statutory and constitutional principles which inhere in this acute problem of federalism stand fast, it encourages, if not assures, a cohesive, consistent, harmonious treatment by our counterparts in the state judiciaries. Thus, for example, did the confidence in the ultimate rightness of the decision of Louisiana courts, expressed without reservation in *T. Smith & Son, Inc.* v. *Williams,* 5 Cir., *supra,* 275 F. 2d 397, turn out to be well founded. This was accomplished without the aid of the much sought for Federal injunction against prosecution in the state court of claims under the Louisiana Workmen's Compensation Act or the necessity or artful constructions of the anti-injunction statute, 28 USCA § 2283. Louisiana has now spoken in terms as positive as *Noah.* Longshoremen are not in the Twilight.

Longshoremen are in the federal area only. The Louisiana State Compensation Act may not validly apply to them. *Ellis* v. *Travelers Ins. Co.*, 1961, — La. —, 129 So. 2d 729; consolidated with *William Stepter* v. *T. Smith & Son, Inc.*, 1961, — La. — 129 So. 2d 740, affirming the Court of Appeals, 123 So. 2d 780 and 788, respectively.

Likewise, in the face of some state court decisions which we have expressly declined to approve or follow, have we spoken in positive terms as to ship repairers. A ship repairer is not in the Twilight. He is in the federal domain. The State Act may not validly apply. *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d 220.

It may seem to be unimportant that a restricted category of workers on new construction should be classified so sharply. But it is of such stuff that the certainty so badly needed in the routine operation of any compensation program will come. The converse is true. The moment what has been thought to be daylight or dark now becomes Twilight, the whole process becomes encumbered with the collateral and disruptive controversy which comes to an end authoritatively only after a long struggle culminating in a *Noah* or a *Flowers* decision.

The Supreme Court drew the line. For those working on uncompleted vessels afloat state compensation acts may validly apply. Congress adopted that line in § 903(a). There is no shadow. There is no obscurity. There is no uncertainty. It is as clear as it was in 1922 that such injuries are for state compensation.

None of the arguments offered to overcome this simple, but positive, lesson of history in action is of any merit. The main contention is that *Grant Smith-Porter Co.* was a "maritime but local" case. Two things are then asserted. The first is that the legisla-

tive history, meager and scarce as it is on this point,[16] made no reference to the "local concern" doctrine. This rests in part on the fact that the Committee Report in its statement that maritime workers are "unfortunately * * * excluded from" state laws and that the "Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation" cited, in addition to *Jensen*, only the two cases holding Congress could not adapt state legislation.[17] That, it is urged, demonstrates that Congress was not legislating with the other cases in mind. But the Supreme Court has not read the legislative history that narrowly (see note 11, *supra* and appended text). When reference was made to *Jensen*, Congress thought, just as do judges, courts and lawyers today, of the whole thing turned loose by that auspicious doctrine. Part of that struggle, inherently part and parcel of the compelling supremacy of the admiralty in the areas where uniformity was essential, was the reflex of that—the area in which application of local laws would not work any "material prejudice to the general maritime law," *Western Fuel Co.* v. *Garcia*, 1921, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

That concept of maritime but local is still valid.[18] The problem is all wrapped up together. The name *Jensen* is a shorthand abbreviation that embraces all. This is manifest from the very recent declaration by

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[16] See the Senate Judiciary Committee Report, S.R. 69 Cong. 1st Sess., Vol. 3, Rep. 973, p. 916; and H.R. 1767, 69 Cong. 2nd Sess., p. 19.

[17] These were *Knickerbocker Ice Co.* v. *Stewart*, 1920, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834; *State of Washington* v. *W. C. Dawson & Co.*, 1924, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403.

[18] See note 14, *supra*.

the Court in *Kossick* v. *United Fruit Co.*, 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56 at 62, — AMC —. "This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, though maritime, is 'maritime and local,' *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242, * * * in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 * * *." And in the context of this compensation struggle, like language was used in *Hahn* v. *Ross Island Sand & Gravel Co.*, *supra*, 358 U.S. 272. Of *Davis* the Court said, "* * * we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitation of *Southern P. Co.* v. *Jensen* * * *." In view of these strong contemporary recognitions of the vitality of the maritime but local concept and our present "clear duty to consider carefully what the law is on this important and far-reaching question," *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922 at 925, 1958 AMC 1534, affirmed and remanded, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 AMC 1631; 274 F. 2d 36, 1960 AMC 2064, expressions in some of our prior cases cannot be controlling. In several it has been said or implied that the consequence of the enactment in 1927 of the Longshoremen's Act was a congressional declaration that "maritime but local" no longer applied. The reasoning essentially was that by virtue of the Longshoremen's Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." *Continental Casualty Co.* v. *Lawson*, 5 Cir., 1933, 64 F. 2d 802 at 805, 1933

AMC 794. At another time it was phrased this way. "No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case * * *," *De Bardeleben Coal Co.* v. *Henderson, supra*, 142 F. 2d 481 at 484. But as the recent cases show without doubt, this ignores element [2], see note 9, *supra*, of the coverage clause. That was made plain in *Davis, supra*. After reviewing the unsuccessful efforts of Congress to adopt state compensation acts, it said of the Longshoremen's Act: "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'" 317 U.S. 249 at 252-53. And *O'Rourke* and *Hahn* are fresh reminders that element [2] makes the inquiry indispensable. Moreover that inquiry, when made, ultimately has to be in the classic terms embodied in the "maritime but local" formula.[19]

This analysis disposes, at the same time, of all of the drydock or marine railway cases[20] even though

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[19] In *Davis* the formula was translated into these terms: "* * * It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the State law "interfere with the proper harmony and uniformity of maritime law?" *Davis* v. *Department of Labor, supra*, 317 U.S. 249 at 254.

[20] See from this Court: *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 1939, 101 F. 2d 732, 1939 AMC 129; *Massachusetts Bonding & Ins. Co.* v. *Lawson*, 5 Cir., 1945, 149 F. 2d 853, 1945 AMC 878; *Avondale Marine Ways* v. *Henderson*, 5 Cir., 1953, 201 F. 2d 437, 1953 AMC 432, affirmed, 346 U.S. 366, 74 S. Ct. 100, 98 L. Ed. 77, 1953 AMC 1990. Also from other Circuits, *United States Casualty Co.* v. *Taylor*, 4 Cir., 1933, 64 F. 2d 521, 1933 AMC 1200, no longer followed, see *Travelers Ins. Co.* v. *McManigal*, 4 Cir., 1944, 139 F. 2d 949, 1944 AMC 377, and *Newport News Shipbuilding & Drydock Co.* v.

plausible arguments from analogy may be constructed that if a marine railway on land is within the coverage, a floating uncompleted hull should likewise be. But these cases do not overcome the categorical pre-1927 holding, adopted by Congress in § 903(a), that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be "validly * * * provided by state law."

Nor does *O'Rourke*, *supra*, require any different result. We pointed out in *Flowers* that this case in the resolution of some of these problems "has, in our judgment, been given altogether too little attention," 258 F. 2d 220 at 223. The case, we stated, "added the further and entirely new concept that where coverage of § 903(a) is applicable, the exclusive liability of § 905 does not depend on the nature or character of the work being done by the injured employee as long as (1) that injury occurs on navigable waters and (2) the employer is such a person 'any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * * .' § 902(4)." 258 F. 2d 220 at 224. But that does not come into play until it is first determined whether the case is within § 903(a) and that requires a finding under element [2], see note 9, *supra*.

As a final thrust it is then insisted that even though "maritime but local" still survives, this is a Twilight case under *Davis*. But what, apart from these very decisions of the two Deputy Commissioners affirmed by two District Courts, brings about the haze of uncertainty? It was clear enough for the Deputy Commissioner to first rule that "It has not been held that

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O'Hearne, 4 Cir., 1951, 192 F. 2d 968; *Western Boat Bldg. Co.* v. *O'Leary*, 9 Cir. 1952, 198 F. 2d 409, 1952 AMC 1639.

the work on an uncompleted vessel comes within the provisions of the Longshoremen's * * * Act." For this February 1959 declaration the Administrator acting within the confines of the Fifth Circuit had some fairly substantial, if not infallible, grounds in the expressions which we made in 1958 in *Flowers*. To acknowledge that this statement may perhaps properly be characterized as dicta does not detract from the fact that this Court in drawing the line for ship repairers thought it necessary to consider that group in contrast to those engaged in new construction and in doing so used very positive language. "In contrast to" repair of a completed vessel, we declared, "work on an uncompleted hull before it has become a ship is not under Federal coverage and is, on the contrary, under State jurisdiction: *Grant Smith-Porter Ship Co.* v. *Rohde* * * *," 258 F. 2d 220 at 222, note 5.[21]

It is surprising, indeed, that with *Grant Smith-Porter Co.* still very much alive in its 49th year and the Longshoremen's Act now in its 4th decade of operations, a thing as well settled as this has suddenly become confused. *Davis* with all of its "Theoretic illogic," 317 U.S. 247 at 259 (concurring) is, as the Court's decisions reflect, "a practical solution to a practical problem," 358 U.S. 272 at 274 (dissenting). It does not serve that function if it is used as a basis

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[21] It would be doctrinaire to quibble over the phrase "before it has become a ship" as does the Deputy Commissioner's brief in reliance on *Tucker* v. *Alexandroff*, 1902, 183 U.S. 424, 22 S. Ct. 195, 46 L. Ed. 264. In any event, in a situation involving the nature of the building of a ship, in contrast to the repair of an existing vessel, the Supreme Court sharply restricted the *Tucker* case. *Thames Towboat Co.* v. *Schooner Francis McDonald*, 1920, 254 U.S. 242 at 244, 41 S. Ct. 85, 65 L. Ed. 2d 245.

for finding new uncertainty, of creating, not solving, doubt.

It is no answer to urge that the distinction at times conceivably may produce results that are extremely fine. That is the inevitable likelihood in dealing with strict jurisdictional lines. The Constitution at times sets up a barrier at the water's edge. It probably does not make much sense from an operational standpoint that a longshoreman injured while handling one end of a bale of cotton on the dock has a state remedy only whereas his counterpart injured when the other end drops while he stands with both feet on the ship's deck must go the federal route. Nor is it any more appealing that a welder fabricating a repair fitting on the dock adjacent to a completed ship is a state case whereas a fellow welder on the ship's deck working on precisely the same fitting must look exclusively to the Longshoremen's Act.

We know by now that nothing written in this field is the last word. All it can be is "the latest word." *T. Smith & Son, Inc.* v. *Williams, supra*, 275 F. 2d 397 at 407. Until there is a further word, this Court, for one at least, has three clear-cut categories: (1) longshoremen working on a ship and (2) repairmen working on a completed vessel are under the Longshoremen's Act; (3) persons working on an uncompleted vessel afloat but under construction are covered by the state act. Thus do we afford to "these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation * * *"[22] by a proceeding which is certain and swift and virtually self-executing. The congressional policy reflected in element [2] of § 903(a) has

[22] S. R. 69th Cong., 1st Sess., Vol. 3, Rep. 973, p. 916; see note 16, *supra*.

freed this remedy for these workers from the agony of case-by-case adjudication with the portentious constitutional overtones[23] involved in nearly every such claim and which, for scholars and historians may be interesting, if not decisive, but which hardly offer a solution to the pressing, immediate, urgent problem of the injured worker, his employer and its insurance carrier.

The compensation order was not in accordance with law and must be set aside, 33 USCA § 921(b).

REVERSED AND RENDERED.

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[23] This is no better illustrated than in the complex field of maritime death actions. See *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F. 2d 42 at 47, note 6, and *Emerson* v. *Holloway Concrete Products Co.*, 5 Cir., 1960, 282 F. 2d 271 at 281, notes 10 and 11 (dissenting) for a summary of the shifting position and alignment of the several Justices; and see Currie, *Federalism and Admiralty, The Devil's Own Mess*, 1960, The Supreme Court Review 158; Baer, *At Sea With the United States Supreme Court*, 38 N.C.L. Rev. 307 (1960).

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 18695

AVONDALE SHIPYARDS, INC., APPELLANT

v.

P. J. DONOVAN, DEPUTY COMMISSIONER, SEVENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, AND MINUS AIZEN, APPELLEES

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, *Circuit Judge:* This case presents for decision the identical question this day decided in *The Travelers Ins. Co. v. Calbeck, Deputy Commissioner*, 5 Cir., 1961, — F. 2d —, — AMC — [No. 18802], whether injuries received by a person working on an uncompleted vessel, launched and afloat but still under construction, are covered under the State or the Federal Longshoremen's Act.

The facts are not significantly different. The Employer, Avondale Marine Ways, Inc., has two large shipyards and regularly performs new construction work and repair work. Generally in the Employer's large labor force the work performed by a particular employee was primarily one rather than the other. Occasionally an employee would perform the other.

The injured employee, however, worked regularly and solely in new construction. The injuries were received on August 11, 1956, while the employee was working as a welder on an uncompleted elevated deck drilling barge. The hull had been launched July 26, 1956, but the vessel was not completed and delivered until November 17, 1956. By stipulation the barge, at the time of the accident, was 57 percent complete based both on probable dollar cost and estimated man hours of work.

Unlike the *Calbeck* case only one Award was issued here. On January 27, 1960, Deputy Commissioner Donovan entered an Award of compensation benefits under the Longshoremen's Act. This was, of course, subsequent to the two Orders of Deputy Commissioner Calbeck in the other similar case then pending before the Bureau of Employees' Compensation, but it was prior to the District Court's Order of April 20, 1960, which remanded the matter for further proceedings and resulted in a complete about-face. See note 5 in *Calbeck*, — F. 2d — at —. The uncertainty and confusion was, therefore, being generated by the two cases themselves.

As in the other case, we hold that injuries to such a worker may validly be covered by the State Compensation Act. Consequently, the Order of the Deputy Commissioner must be set aside as not in accordance with law, 33 USCA § 921(b).

This makes it unnecessary to pass on the additional contention of the Employer that payments aggregating several thousand dollars for compensation and medical expense ostensibly made under the Louisiana Act constituted such an administrative determination as to be within that aspect of *Davis* v. *Department of Labor*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653.

REVERSED AND RENDERED.

APPENDIX C

JUDGMENT

Extract from the Minutes of July 13, 1961

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY

v.

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the appellants, The Travelers Insurance Company and Levingston Shipbuilding Company.

JUDGMENT

Extract from the Minutes of July 13, 1961

No. 18695

AVONDALE SHIPYARDS, INC.

v.

P. J. DONOVAN, DEPUTY COMMISSIONER, SEVENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, AND MINUS AIZEN

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellant, Avondale Shipyards, Inc.

U.S. GOVERNMENT PRINTING OFFICE: 1961